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MICROSOFT CORPORATION

First Applicant

MICROSOFT PTY LIMITED

Second Applicant

**INTERTRUST TECHNOLOGIES
CORPORATION**

Respondent

AFFIDAVIT OF JOHN VICTOR SWINSON

On 31 March 2004, I, John Victor Swinson of 1 Eagle Street, Brisbane, Queensland, solicitor,
solemnly and sincerely declare and affirm:

- 1 I am a partner of Mallesons Stephen Jaques ("Mallesons") and, in conjunction with Kim O'Connell, have the day-to-day conduct of this matter on behalf of the Applicants ("Microsoft"). I am a solicitor admitted to practice in NSW and Queensland, and I am also an attorney admitted to practice in New York State and before the Northern District of California. I have practiced patent law in both Australia and the United States. I also hold a degree majoring in computer science.
- 2 This affidavit is in support of Microsoft's objection to the notice of motion filed by the Respondent ("Intertrust") dated 26 March 2004.

Microsoft's case
- 3 Microsoft's case is that the claims of Australian Patent No. 728,776 ("the Patent") are not novel, that the claims are not clear and succinct, and that the claims are not fairly based. Microsoft's evidence in relation to novelty focuses on 8 prior art publications. These prior art publications are as follows:

Filed on behalf of the Applicants by:
MALLESONS STEPHEN JAQUES
Governor Phillip Tower
1 Farrer Place
SYDNEY NSW 2000

DX 113, SYDNEY
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Ref: BSG:KOC
7224214

Publication	Reference in Amended Particulars of Invalidity	No. of Pages	Comment
Australian Patent No. 711,733 ("the '733 patent")	Annexure A, item 3 (same as Annexure A, item 1)	1048 pages	This patent is owned by Intertrust.
The Digibox Article	Annexure A, item 2	14 pages	Written by Intertrust.
Patent WO 96/24092 ("the Benson patent")	Annexure A, item 6	57 pages	The subject of US Patent Office interference with US version of the Patent. Not disclosed by Intertrust until after Microsoft filed its evidence.
The Warwick Framework	Annexure A, item 7	26 pages	Abbreviated version provided by Intertrust in discovery on 17 July 2003.
European Patent No. EP 0 715 245 A1 ("the Stefik patent")	Annexure A, item 8	43 pages	Provided by Intertrust in discovery on 17 July 2003.
The Bento Specification	Annexure A, item 9	106 pages	Discovery shows Bento was known to Intertrust prior to filing Patent.
ISO 8879:1986 ("the SGML Standard")	Annexure A, item 4	171 pages	Discovery shows that SGML was known to Intertrust since at least 1994.

- 4 Microsoft also asserts that the claims of the Patent do not involve an inventive step and that the specification of the Patent lacks appropriate definition. In relation to lack of inventive step, Microsoft's evidence includes reference to 11 additional publications (items 10 to 20 of Annexure D of the Amended Particulars of Invalidity (Exhibit "AJM-6")) which Microsoft asserts will be found to be common general knowledge in Australia and found to provide technical background information.
- 5 The Amended Particulars of Invalidity (Exhibit "AJM-6"), at Annexure A, list the prior art publications relied upon by Microsoft in relation to lack of novelty. Items 1 and 3 on this list are substantially the same document (which are both Intertrust-authored documents). Item 5 on this list is a handbook that incorporates and provides some explanation of item 4, namely the SGML Standard.

[Handwritten signatures]

- 6 The Amended Particulars of Invalidity (Exhibit "AJM-6"), at Annexure B, lists three prior art "acts" asserted by Microsoft in relation to lack of novelty. These three "acts" are all related to use of the technology set out in the publications listed in paragraph 4 above.

Microsoft' Particulars of Invalidity

- 7 Microsoft filed and served its Particulars of Invalidity ("**the Original Particulars of Invalidity**") on 27 November 2002.

- 8 At no time did Intertrust request further particulars of the Original Particulars of Invalidity.

- 9 The Original Particulars of Invalidity relied on two prior art documents, namely the '733 patent and the Digibox article, in relation to lack of novelty and lack of inventive step. Both these documents were authored by Intertrust.

- 10 As a result of Intertrust's discovery, Microsoft learnt of additional prior art relevant to the Patent. In particular:

- (a) in relation to the Warwick Framework document, Intertrust gave discovery of a document by Carl Lagoze titled "The Warwick Framework: A Container Architecture for Diverse Sets of Metadata". Although this document does not appear anywhere on Intertrust's Verified List of Documents, an electronic version of this document was included by Intertrust on the CD-ROM containing Intertrust's discovery provided to Mallesons on 17 July 2003. The document has not been given an "IT" document number by Intertrust. Based on Intertrust's discovery, I believe that this document was disclosed to the U.S. Patent Office by Intertrust, but was not disclosed to the Australian Patent Office. The document contains the text:

This paper is an abbreviated version of The Warwick Framework: A Container Architecture for Aggregating Sets of Metadata. It describes a container architecture for aggregating logically, and perhaps physically, distinct packages of metadata...

The full text of the Warwick Framework document was not disclosed by Intertrust. However, as a direct result of Intertrust's disclosure of the above-referenced abbreviated document, I looked for and located the Warwick Framework document.

- (b) in relation to the Stefik patent, an electronic version of this document was included by Intertrust on the CD-ROM containing Intertrust's discovery provided to Mallesons on 17 July 2003. This document does not appear anywhere on Intertrust's Verified List of Documents. The document has not been given an "IT" document number by Intertrust. Based on Intertrust's discovery, I believe that this document was disclosed to the U.S. Patent Office by Intertrust, but was not disclosed to the Australian Patent Office.

- (c) in relation to the Bento Specification, on 17 July 2003, Intertrust disclosed a document numbered IT2202 and titled "VDE Containers - Concepts and components" written by Intertrust. This document has been designated by Intertrust as "Confidential" and Mallesons could not show it to Microsoft's expert witness. Annexed and marked "Confidential JVS-1" is a quote from this document relating to the Bento Specification and its application to the subject matter of the Patent.

Then on 30 October 2003, Intertrust disclosed a document numbered IT2779 titled "OpenDoc Implementation Strategies" written by Intertrust. This document has been designated by Intertrust as "Confidential" and Mallesons could not show it to Microsoft's expert witness. Annexed and marked "Confidential JVS-2" is a quote from this document relating to the Bento Specification and its application to the subject matter of the Patent.



As a result of these two documents, I requested that Microsoft's expert witness, Michael Hitchens, consider the Bento Specification.

- (d) in relation to the SGML Standard, on 30 October 2003, Intertrust disclosed a document numbered IT2219 titled "SGML as a template description language" written by Intertrust. This document has been designated by Intertrust as "Confidential" and Mallesons could not show it to Microsoft's expert witness. Annexed and marked "Confidential JVS-3" is a quote from this document relating to SGML and its application to the subject matter of the Patent.

As a result of this document, I requested that both Microsoft's expert witnesses consider the SGML Standard.

- (e) in relation to the Benson patent, on 16 October 2003, I read an article in a newsletter that stated that a company called Macrovision was involved in an interference proceeding with Intertrust in the U.S. Patent Office. Macrovision is asserting, in part, that Macrovision's Benson patent, which is prior to the claimed priority date of the Patent, covers the same subject matter as the U.S. version of the Patent. Annexed and marked "JVS-4" is a copy of Mallesons' facsimile to Freehills concerning this interference. Although highly relevant to the issues in this case, Intertrust did not disclose any documents concerning the Macrovision interference proceeding until after Microsoft had filed its evidence.

11 Accordingly, as a result of documents provided by Intertrust in discovery and the news report that I found, discussed above, Mallesons became aware of additional prior art after the Original Particulars of Invalidity were filed. Microsoft's expert witnesses then reviewed in detail this additional prior art and compared it to the claims in the Patent. It was not until

December 2003, less than two months after some of this new prior art was disclosed by Intertrust, that Microsoft was in a position to amend its Original Particulars of Invalidity.

- 12 Mallesons provided Freehills with a proposed amendment to the Original Particulars of Invalidity on 12 December 2003 ("Amended Particulars of Invalidity"). On 15 December 2003, Freehills consented to the Amended Particulars of Invalidity without reservation.
- 13 I have reviewed the Affidavit of Anthony Muratore dated 26 March 2004 ("the Muratore affidavit"). At paragraph 51 of the Muratore affidavit, Mr Muratore gives the impression that the amendments proposed by Microsoft on 12 December 2003 were substantial. I make the following comments in response:
- (a) All the prior art documents and acts added to the Amended Particulars of Invalidity related to novelty were as a result of documents or information contained in Intertrust's discovery or the newsletter that I found and discussed above.
 - (b) Paragraph 51(a) double counts 2 prior art documents (i.e., items 1 and 3 of Annexure A of the Amended Particular of Invalidity are substantially the same document).
 - (c) Paragraphs 51(a) and 51(d) double count 7 prior art documents (i.e., items 3 to 9 of Annexure D are also items 3 to 9 of Annexure A).
 - (d) Paragraphs 51(b) and 51(e) double count 3 prior art "acts" (i.e., items 1 to 3 of Annexure B are also items 1 to 3 of Annexure E).
 - (e) Microsoft's expert witnesses identified additional ambiguities in the claims and specification after the Original Particulars of Invalidity were filed.
 - (f) Particulars of Invalidity 5(vi), (viii) and (ix) and 7(iv), (v) and (vi) were deleted, simplifying the dispute.
- 14 At paragraphs 57 and 58 of the Muratore affidavit, Mr Muratore gives the impression that Microsoft is asserting a large number of documents as prior art. As stated above at paragraph 4, Microsoft's evidence in relation to novelty focuses on 8 prior art publications. The other prior art that Mr Muratore lists is either a double-counting of the same document (as Mr Muratore partially acknowledges in paragraph 58) or is listed in the Amended Particulars of Invalidity, Annexure D, as demonstrating the common general knowledge or to provide technical background information. Microsoft primarily relies upon 1,465 pages of prior art publications, and of these, 1,062 pages were written by Intertrust (items 1 to 2 of Annexures A and D). Only 403 pages of prior art directly relating to novelty were added due to the December 2003 amendments. Intertrust has not claimed that any of the prior art added in December 2003 was unknown to Intertrust prior to the amendment.



- 15 At the time Intertrust consented to the Amended Particulars of Invalidity, and for the next 12 weeks, Intertrust did not make any complaints or comments about the Amended Particulars of Invalidity.
- 16 On 4 March 2004, Freehills wrote to Mallesons and for the first time asserted that the Amended Particulars of Invalidity were not detailed enough. Freehills requested an extension of time to file evidence-in-reply in part due to "the time taken to address the numerous discovery requirements and finalise discovery" (Exhibit "AJM-7"). That same day, Mallesons replied to Freehills, and did not consent to an extension of the timetable, in part due to Freehill's delay in raising this issue (Exhibit "AJM-8").
- 17 On 11 March 2004, Freehills served on Mallesons a Request for Further and Better Particulars. This request had 82 paragraphs and sub-paragraphs (Exhibit "AJM-9").
- 18 On 12 March 2004, Mallesons wrote to Freehills objecting to a number of the requests for particulars (Exhibit "AJM-10"). Freehills did not directly respond to this.
- 19 On 16 March 2004, in response to Freehill's Request for Further and Better Particulars, and without admitting that such particulars were necessary to enable Intertrust to understand Microsoft's case, Mallesons proposed further amendments to the Particulars of Invalidity ("Second Amended Particulars of Invalidity") ("AJM-12"). These amendments were to address the issues raised by Intertrust in the Request for Further and Better Particulars, as follows:

Intertrust's Request for Further and Better Particulars ("AJM-9")	Proposed Amendment ("AJM-12")
Paragraph 1	Page references added in Annexure A
Paragraphs 2 to 4	Details added to Annexure B
Paragraph 5	Paragraph 2(ii) amended; Annexure C added
Paragraph 6	Paragraph 2(iii) deleted; Item 10 deleted from Annexure A
Paragraph 7	Paragraph 3(ii)(a) amended; paragraph 3(i)(c) added
Paragraph 9	3(i)(a) amended
Paragraph 11	Page references added in Annexure D (was Annexure C)
Paragraphs 12 to 18	Details added to Annexure E (was Annexure D)
Paragraph 22	Paragraph 3(ii)(b) amended; Annexure F added
Paragraph 23	Paragraph 3(iii) deleted
Due to Freehill's cover letter dated 11 March 2004	Paragraphs 6(i) and 6(xxviii) deleted
Wording clarification, not due to Freehill's request	Paragraph 4 amended
Not due to Freehill's request	6(iv) to 6(vii) added

- 20 The amendments that were made are consistent with, and reflect, the evidence that Microsoft has filed. In the Second Amended Particulars of Invalidity, no new prior art or prior "uses" were added by Microsoft.
- 21 Until 4 March 2004, Intertrust had not indicated that it would seek additional particulars from Microsoft, or that it had any concerns with Microsoft's Original or Amended Particulars of Invalidity. For many of the particulars Intertrust requested for the first time in March 2004, in my opinion, the opportunity to make that request had been open to Intertrust since Microsoft first filed its Original Particulars of Invalidity in November 2002. For example, in paragraph 7 of its facsimile of 11 March 2004 (Exhibit "AJM-9"), Intertrust requests "Microsoft to identify the common general knowledge as at the priority date on which the Applicants will rely". This request could have been made in December 2002, as nothing has changed in relation to this aspect of Microsoft's case.
- 22 In Microsoft's Second Amended Particulars of Invalidity, at Annexures C and F, Microsoft sets out particulars of six sets of documents which can be read together as a single document. Intertrust asserts that this is not sufficient information to allow Intertrust to understand Microsoft's case. At paragraph 62 of the Muratore affidavit, Mr Muratore states that the basis on which the sets of documents in Annexures C and F can be combined "is not self-evident, nor is it clear on the face of the documents." This is incorrect. For example:
- (a) Documents 2 and 9 are Intertrust's DigiBox Article and the Bento Specification. The DigiBox Article states at pages 176 and 177 that the DigiBox container mechanism can provide extensions to OpenDoc (which is the Bento Specification technology). This is explained in the First Hitchen Affidavit at paragraphs [245] and [274].
 - (b) Documents 3, 4 and 9 are Intertrust's '776 patent, the SGML Standard and the Bento Specification. The '776 patent (at page 435) teaches the use of SGML definitions in conjunction with the '776 technology. This is explained in the King Affidavit at paragraphs [398] to [401] and [451] to [454]. The '776 patent explicitly refers to *Bento* at pages 387 and 389. This is explained in the First Hitchen Affidavit at paragraphs [276] to [277] and [281]. Additionally, the Bento Specification states at page 58 demonstrates the use of SGML to define templates. This is explained in the Second Hitchen Affidavit at paragraphs [35] to [37].
 - (c) Documents 3 and 4 are Intertrust's '776 patent and the SGML Standard. The '776 patent teaches the use of SGML definitions in conjunction with the '776 technology at page 435. This is explained in the King Affidavit at paragraphs [398] to [401] and [451] to [454].



- (d) Documents 3 and 9 are Intertrust's '776 patent and the Bento Specification. The '776 patent explicitly refers to *Bento* at pages 387 and 389. This is explained in the First Hitchen Affidavit at paragraphs [276] to [277] and [281].
- (e) Documents 4 and 9 are the SGML Standard and the Bento Specification. The Bento Specification at page 58 demonstrates the use of SGML to define templates. This is explained in the Second Hitchen Affidavit at paragraphs [35] to [37].
- (f) Documents 4 and 7 are the SGML Standard and the Warwick Framework. The Warwick Framework states (at pages 18 to 21) that SGML may be used to express meta-data including structural meta-data. An example of how this may be done is given in the Warwick Framework at pages 18 to 21. This is explained in the King Affidavit at paragraph [231] and in the Second Hitchen Affidavit at paragraphs [20] to [24].

Intertrust's Discovery Delays

- 23 Intertrust's discovery was substantially delayed.
- 24 On 18 December 2002, His Honour Justice Lindgren ordered the parties to complete inspection of documents by 30 May 2003. Intertrust did not do so.
- 25 On 5 June 2003, His Honour Justice Lindgren ordered each party to serve electronic copies of non-privileged documents by 19 June 2003. Intertrust did not do so.
- 26 Intertrust provided discovery to Microsoft in waves. Microsoft did not seek any new categories of documents from Intertrust. Intertrust provided discovery in waves because its initial discovery was deficient. A large part of Intertrust's discovery was only disclosed after Microsoft's repeated requests and two applications for directions. Intertrust conceded costs in relation to the first application.
- 27 Intertrust provided documents to Microsoft as part of its discovery obligations on:
 - (a) 17 July 2003;
 - (b) 31 October 2003;
 - (c) 22 December 2003 (after Microsoft had filed its evidence); and
 - (d) 27 February 2004 (after Microsoft had filed its evidence).
- 28 On 17 July 2003, Intertrust stated that, to the best of its knowledge, information and belief, Intertrust had discovered all of the documents relating to this matter that it has now, or ever had, in its possession, custody or power. Annexed and marked "JVS-5" is a copy of the affidavit of Eric Olsen (Intertrust's director of intellectual property) to this effect. I understood from this statement that Intertrust's discovery was complete.



- 29 Over 17,400 pages of relevant documents were disclosed late by Intertrust in the October, December and February waves of disclosure.
- 30 For example, the initial July discovery by Intertrust did not include any of the following documents, which were directly relevant to the issues in dispute in this matter, and were disclosed by Intertrust after its first (supposedly complete) disclosure:
- (a) the Macrovision interference documents, as discussed above at paragraph x;
 - (b) reports and presentations concerning the scope of the Patent prepared by Intertrust in relation to its acquisition by Sony Corporation of America and Royal Philips Electronics;
 - (c) significant email documents; and
 - (d) documents concerning the similar prior art IBM Cryptolope system, and comparisons made by Intertrust of Cryptolopes to the Intertrust DigiBox technology.

31 As stated above at paragraph [10], the documents discovered by Intertrust after 17 July 2003 included documents directly relevant to the issues in dispute, and related to prior art considered by Microsoft's expert witnesses.

32 Correspondence from Mallesons concerning Intertrust's discovery failures and delays are annexed and marked "JVS-4", "JVS-6", "JVS-7", "JVS-8", "JVS-9", "JVS-10" and "JVS-11".

33 At paragraph 92 of the Muratore affidavit, Mr Muratore states that:

the discovery issues raised by Microsoft in these proceedings have involved Intertrust employees, Intertrust's U.S. attorneys and my team (consisting of 3 solicitors and 4 data entry paralegal staff) at Freehills in, among other things... responding to approximately 20 letters from Mallesons relating to discovery...".

Intertrust's final wave of discovery, provided on 27 February 2004 was more than nine months late, and only provided after Microsoft requested a directions hearing in December 2003.

34 At paragraph 94 of the Muratore affidavit, Mr Muratore states:

[o]f the documents produced to Microsoft in the Australian proceedings, as far as could be ascertained, not one has been cited in Microsoft's evidence in chief or referred to in any of Microsoft's particulars of invalidity.

35 As noted above, this is incorrect. As stated above at paragraph 10, several of the documents discovered by Intertrust were included as part of Microsoft's evidence, or provided a train of enquiry or confirmed the relevance of a train of enquiry, that resulted in additional prior art being added to Microsoft's Particulars of Invalidity.

Alm pgh

36 At paragraph 88 of the Muratore affidavit, Mr Muratore states that Intertrust has produced approximately 3 million pages of material to Microsoft in a U.S. court proceeding. (I am informed by Richard McLeod, an attorney at Klarquist Sparkman, Microsoft's attorneys in the U.S., that more than 1 million pages of documents were withdrawn from discovery by Intertrust as being irrelevant.) Those documents are subject to a Protective Order, and the majority of those documents cannot be disclosed to Mallesons or used in this case. Moreover, based upon my review of the pleadings in the U.S. court proceeding, where Intertrust is the plaintiff, that action relates to over 10 U.S. patents that are not currently the subject of Australian court proceedings.

Microsoft's Supplementary Evidence

37 On 18 November 2003, Microsoft sought to secure an agreement with Intertrust to contest this matter by reference to the independent claims, with a view to reducing the matter's cost and complexity.

38 On 15 January 2004, more than 9 weeks later, and after Microsoft had filed its evidence, including limited evidence relating to the dependent claims, Intertrust rejected Microsoft's offer to simplify this case.

39 In response, Microsoft decided that it wished to have its expert witnesses review only 5 of the 54 dependent claims on prior art grounds. Some of these claims had already been considered by the expert witnesses in relation to section 40 grounds. As a consequence, Microsoft filed and served the Second Affidavit of Michael Hitchens, sworn on 12 March 2003. The Second Affidavit of Michael Hitchens is 17 pages long, has no exhibits or annexures, and relies entirely on prior art referred to in Michael Hitchens' first affidavit filed on 8 December 2003. The Second Affidavit of Michael Hitchens is directed at dependent claims 24, 27, 28, 31 and 32. Because these claims depend from independent claim 21, this Second Affidavit also reconsidered some of the prior art previously considered in relation to claim 21.

40 The dependent claims considered in the Second Affidavit, although vague, are not complex. For example, claim 32 recites:

A method as in Claim 21, in which said specific information required to be included includes a copyright notice.

The Second Affidavit states that claim 32 is not disclosed in the specification of the Patent, and points to a sentence in each of the '733 patent and the Bento specification that refer to copyright notices or copyright laws.

Prior "Uses"

41 The Muratore affidavit includes a number of statements and conclusions regarding Microsoft's Second Particulars of Invalidity in relation to prior "uses".

Alh H. Gal

42 At paragraph 9 of the Muratore affidavit, Mr Muratore lists a number of technologies. Based upon my review of Intertrust's discovery, I conclude that SGML, the Dublin Core, the Warwick Framework, Bento containers, IBM Cryptolopes and object-oriented languages were all known to Intertrust prior to the alleged priority date of the Patent. I also conclude that some of these technologies were used or analysed by Intertrust prior to the alleged priority date of the Patent. From the Intertrust discovery that I have reviewed, Intertrust used or considered use of some of these technologies in Intertrust's attempt to implement the system described in the Patent.

AFFIRMED at BRISBANE
before me:

Signature of authorised witness

Name of authorised witness

1 Eagle Street, Brisbane Qld 4000

Address of authorised witness

Solicitor

Capacity in which authorised witness takes the affidavit

Signature of Deponent

Form 20A Affidavit – certificate of compliance

(Order 14, rule 5A)

I, Bradley Scott Galvin, certify to the Court that the affidavit of John Victor Swinson affirmed on 31 March filed on behalf of the Applicants complies with Order 14, rule 2 of the Federal Court Rules

Date: 31/3/04



Legal representative for the Applicants

IN THE FEDERAL COURT OF AUSTRALIA)
NEW SOUTH WALES DISTRICT REGISTRY)

No. N1260 of 2002

MICROSOFT CORPORATION

First Applicant

MICROSOFT PTY LIMITED

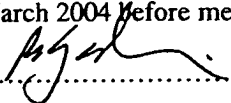
Second Applicant

**INTERTRUST TECHNOLOGIES
CORPORATION**

Respondent

CONFIDENTIAL EXHIBIT JVS-1

This is Confidential Exhibit JVS-1 to the affidavit of John Victor Swinson, sworn on
31 March 2004 before me:


.....

Solicitor

Filed on behalf of the Applicants by:
MALLESONS STEPHEN JAQUES
Governor Phillip Tower
1 Farrer Place
SYDNEY NSW 2000

DX 113, SYDNEY
Tel: (02) 9296 2000
Fax: (02) 9296 3999
Ref: BSG:KOC
7224214

QUOTATION FROM IT 2202
"VDE Containers: Concepts and components"

2.7 Related standards and technologies

2.7.1 Container standards

The first release of VDE containers will be constructed around the Bento/OpenDoc container standard.

[p.13]

IN THE FEDERAL COURT OF AUSTRALIA)
NEW SOUTH WALES DISTRICT REGISTRY)

No. N1260 of 2002

MICROSOFT CORPORATION

First Applicant

MICROSOFT PTY LIMITED

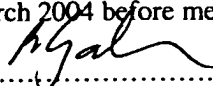
Second Applicant

**INTERTRUST TECHNOLOGIES
CORPORATION**

Respondent

CONFIDENTIAL EXHIBIT JVS-2

This is Confidential Exhibit JVS-2 to the affidavit of John Victor Swinson, sworn on
31 March 2004 before me:



.....
Solicitor

QUOTATIONS FROM IT2779 "OpenDoc Implementation Strategies"

Technical Overview:

...
OpenDoc is built over Bento, a low level container and storage management implementation.

...
[Intertrust]'s DigiBox container specification closely resembles the OpenDoc/Bento architecture with a concentration on the security mechanisms rather than the purely type-centric view of Bento.

[p.1]

IN THE FEDERAL COURT OF AUSTRALIA)
NEW SOUTH WALES DISTRICT REGISTRY)

No. N1260 of 2002

MICROSOFT CORPORATION

First Applicant

MICROSOFT PTY LIMITED

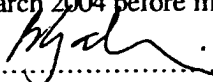
Second Applicant

**INTERTRUST TECHNOLOGIES
CORPORATION**

Respondent

CONFIDENTIAL EXHIBIT JVS-3

This is Confidential Exhibit JVS-3 to the affidavit of John Victor Swinson, sworn on
31 March 2004 before me:


.....

Solicitor

QUOTATIONS FROM IT2219 "SGML as a template description language 02/02/94"

Overview:

This white paper discusses the use of SGML as a template description language for use within the VDE architecture ... SGML provides many of the desired features and is easily extended to accommodate the remaining features.

SGML

SGML is an ASCII based document description and markup language that consists of two significant components; a document template description called a DTD and the document itself.

....

[p.1]

SGML and EPR

[Intertrust] would use the DTD as the document description language that is stored within modules and load modules and the SGML based document would be the content of the static and user data records referenced within the methods. Load modules would contain two DTD's, one that describes the format of the static record associated with it and another describes the format of the user data record(s) it requires.

[p. 2]

IN THE FEDERAL COURT OF AUSTRALIA)
NEW SOUTH WALES DISTRICT REGISTRY)

No. N1260 of 2002

MICROSOFT CORPORATION

First Applicant

MICROSOFT PTY LIMITED

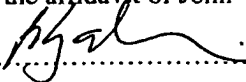
Second Applicant

**INTERTRUST TECHNOLOGIES
CORPORATION**

Respondent

EXHIBIT JVS-4

This is Exhibit JVS-4 to the affidavit of John Victor Swinson, sworn on 31 March 2004 before me:


.....

Solicitor

MALLESONS STEPHEN JAKES

Confidential communication

Attention Anthony Muratore

Freehills
MLC Centre
Martin Place
Sydney NSW 2000
Fax (02) 9322 4000

21 October 2003

K O'Connell
Partner
Direct line
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Dear Sirs

Microsoft Corporation & Anor v Intertrust Technologies Corporation

Intertrust's conduct in this matter to date has not facilitated the just and expeditious resolution of this dispute, nor the identification of the real issues between the parties.

There are many outstanding issues which we have raised in correspondence both prior to and since your firm took over the conduct of the matter on behalf of your client in mid August. With respect to some issues, we have had a partial or holding response, in respect of others, no response at all. Intertrust is in breach of court orders concerning its discovery, which was due to be completed in July. On 10 October, you emailed us stating:

"Our client continues to review the discovery issues and we expect to write to you regarding these issues early next week. The above documents will be included in a supplementary discovery list once our client's review is complete."

Despite this assurance, we received no correspondence in relation to the status of your client's discovery last week.

Intertrust's incomplete list of documents was provided to us in June, and we are still waiting for it to be revised and completed.

As an additional example, we have received no response from you to our letters of 9 October or 16 October (copies attached). We received only a "preliminary" response from Piper Alderman to our letters of 18 July and 25 July.

The outstanding discovery is critical to the resolution of the issues in dispute and the preparation of evidence. For example, on 18 July, we identified that we had not received any discovery from Intertrust concerning the prior art Cryptolope system:

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6882986_2 / 04-5083-4350 / JSWINSO

Page 1 of 7

MALLESON'S STEPHEN JAQUES

Freehills

21 October 2003

"Documents concerning the IBM Cryptolope system, and comparisons of that system to the DigiBox. These documents would fall at least within categories 2, 3, 14 and 19(b) of the documents to be discovered by the Respondent."

The Cryptolope product is prior art and clearly relevant. Intertrust, in a published document (not disclosed by Intertrust in discovery), refer to it as being "superficially similar" to the Intertrust technology. To make this statement, Intertrust must have had documents relevant to the Cryptolope system, and undertaken some analysis or comparison to determine the similarities and differences. No such documents have been disclosed as currently or previously existing.

We asked in July for disclosure of the initial specifications for the DigiBox container that Intertrust submitted to the ANSI IISP Electronic Publishing Task Force, as referred to in the Abstract of the article "The DigiBox: A Self-Protecting Container for Information Commerce." This document would fall at least within categories 2, 3, 7(b), 8(b) and 12 of the documents to be discovered by Intertrust. No such documents have been disclosed as currently or previously existing.

A letter from Piper Alderman dated 29 July 2003 indicates that Intertrust asserts that, after a "reasonable search" it has discovered all documents that are or have been in its possession, custody or control. The deficiencies in discovery outlined above, among others we have identified in previous correspondence, suggest that your client has not conducted a sufficiently thorough search for relevant documents.

A further example is that Intertrust has not disclosed all the references cited in the footnotes to the article "The DigiBox: A Self-Protecting Container for Information Commerce."

A recent press report states that a company called Macrovision is in an interference proceeding in the U.S. P.T.O. regarding an Intertrust patent. The article states:

"The Macrovision patent was purchased from a now-defunct company called MediaDNA, which shopped the technology to many different groups—including InterTrust—several years ago. At the time, InterTrust looked at the patents and declined the offer, said CEO Talal Shamoon."

Intertrust has not provided any disclosure concerning the interference proceeding nor the initial analysis conducted by Intertrust of the Macrovision patent. Such documents would fall within at least category 2 and possibly category 7, 9 and/or 10 and/or other categories.

There are many other areas where Intertrust's discovery is deficient, and we have no indication from you as to when these issues will be resolved.

Intertrust also appears to be taking an extreme position on a number of issues which we have attempted to define with Notices to Admit Facts.

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Page 2

MALLESON'S STEPHEN JAGUES

Freehills

21 October 2003

Intertrust does not admit that terms used in the Patent have the same meaning as the identical terms used in other Intertrust patents, does not admit statements that are taken directly from the specification of Intertrust patents, and does not admit statements quoted directly from Intertrust documents.

In respect of the meaning of the claims of the Patent, we are not clear whether Intertrust is taking a different view in this case to that asserted by Intertrust in the proceedings involving the First Applicant and Intertrust in the U.S. District Court. In response to the Applicants' Third Notice to Admit, Intertrust denied facts that, in our view, corresponded to Intertrust's claim interpretation which was adopted by the U.S. District Court in relation to U.S. Patent No. 5,920,861. Your fax of 16 October confuses Intertrust's position. Would you please let us know whether Intertrust's position is that it accepts that the meaning of the claims of the Patent is the same as its position in relation to U.S. Patent No. 5,920,861 as advanced in the case currently before the U.S. District Court and adopted by the U.S. District Court in the Markman hearing.

Unless we have a prompt response from you in relation to all outstanding issues, we intend to bring this matter back before the Court for appropriate orders.

We look forward to hearing from you.

Yours faithfully

Mallesons Stephen Jagues

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IN THE FEDERAL COURT OF AUSTRALIA)
NEW SOUTH WALES DISTRICT REGISTRY)

No. N1260 of 2002

MICROSOFT CORPORATION

First Applicant

MICROSOFT PTY LIMITED

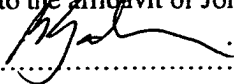
Second Applicant

**INTERTRUST TECHNOLOGIES
CORPORATION**

Respondent

EXHIBIT JVS-5

This is Exhibit JVS-5 to the affidavit of John Victor Swinson, sworn on 31 March 2004 before me:



Solicitor

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY

)
) No. N1260 of 2002

MICROSOFT CORPORATION

First Applicant

MICROSOFT PTY LTD

(ACN 002 589 460)

Second Applicant

INTERTRUST TECHNOLOGIES CORPORATION

Respondent

LIST OF DOCUMENTS OF THE RESPONDENT

Pursuant to the order of Justice Lindgren made on 5 June 2003, the Respondent says:

1. The Respondent has in its possession, custody or power the documents enumerated or otherwise described in Schedule 1 annexed hereto.
2. The documents described in Part 2 of Schedule 1 are confidential communications between the Respondent, its solicitors, patent attorneys and counsel retained on its behalf and are privileged from production on the grounds of legal professional privilege or patent attorney privilege. The Respondent objects to their production.
3. The documents identified with an answer "Yes" in the column marked "Confidential" in Part 1 of Schedule 1 are commercially sensitive and confidential to the Respondent or must be maintained in confidence because of one or more confidentiality agreements entered into between the Respondent and various third parties. The Respondent objects to the disclosure of these documents to any persons other than the Applicants' external Australian solicitors and counsel. The Respondent will produce these documents to the Applicants' external Australian solicitors and counsel subject to the provision of appropriate undertakings.
4. To the best of the Respondent's knowledge, information and belief neither the Respondent nor its solicitors nor any other person on its behalf has now, or ever had, in his possession, custody or power, any document relating to any matter in question between the Applicants and the Respondent,

PIPER ALDERMAN, Lawyers
Level 23
1 Farrer Place
Sydney NSW 2000
DX 10216 Sydney Stock Exchange
Comlit:68685.2

Tel: (02) 9253 9999
Fax: (02) 9253 9900
Ref: ANA INT043/1

other than the documents enumerated in the said Schedule 1.

Dated 20 June 2003.



A N Abbott
Respondent's Solicitor

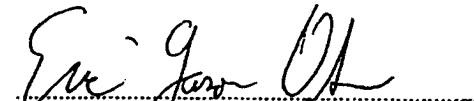
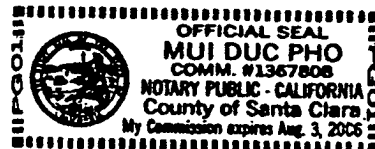
AFFIDAVIT

On 6/19/2003 I, Eric Jason Olsen of 4800 Patrick Henry Drive, Santa Clara, CA 95054,
United States of America, attorney, SAY ON OATH:-

1. I am a director of intellectual property of the Respondent.
2. I am authorised to depose to the facts contained in this affidavit on behalf of the Respondent by the Board of Directors of the Respondent, which authorisation is conveyed to me by Mr Jeff McDow, Vice-President - Intellectual Property of the Respondent.
3. The statements of fact made in paragraphs 1, 2 and 3 of the above list are true.

Sworn at SANTA CLARA, CALIFORNIA,
UNITED STATES OF AMERICA

before me: MUI D. PHO, Notary
Public


Eric Jason Olsen

I certify that, according to my instructions, this list and the statements in it are correct.

Dated 20 June 2003.



A N Abbott
Respondent's Solicitor

IN THE FEDERAL COURT OF AUSTRALIA)
NEW SOUTH WALES DISTRICT REGISTRY)

No. N1260 of 2002

MICROSOFT CORPORATION

First Applicant

MICROSOFT PTY LIMITED

Second Applicant

**INTERTRUST TECHNOLOGIES
CORPORATION**

Respondent

EXHIBIT JVS-6

This is Exhibit JVS-6 to the affidavit of John Victor Swinson, sworn on 31 March 2004 before me:


.....
Solicitor

MALLESONS STEPHEN JAQUES

URGENT

Confidential communication

Attention: A N Abbott

18 July 2003

Piper Alderman
Lawyers
167 Flinders Street
Adelaide SA 5000
Fax (08) 8205 3300

N Murray
Direct line
+61 2 9296 2263
Partner
K O'Connell

Dear Sirs

Microsoft Corporation & Microsoft Pty Limited v Intertrust Technologies Corporation

Thank you for providing your client's documents on DVD on 17 July 2003. We have a number of concerns regarding your client's document discovery. We set out our preliminary concerns in this fax.

As an initial point, electronic versions of your client's documents have been provided in an unacceptable form in that it is virtually impossible to identify or view an individual document from Intertrust's list. For example:

- DVD-2 contains one PDF file which contains almost 41,000 pages of documents. Approximately half of Intertrust's documents are jumbled in this one file. There is no internal index for this file. It is virtually impossible to find, view or print a single document from this disk of Intertrust's list of documents.
- On DVD-1, there are many unrelated documents in a number of the PDF files. For example, one PDF file on this disk contains numerous documents, including document 438 (a DigiBox template), document 439 (a series of emails) and document 476 (a U.S. P.T.O. file wrapper). This file also includes, for example, a document labelled IT00018057, which does not appear anywhere on Intertrust's list.
- The documents on the disks are not labelled or named according to the document number on Intertrust's list. For example, if we wish to find document number 523, there is no file called 523 or called IT03801640 or similar. Thus, there is no way of correlating the files provided with Intertrust's list of documents.
- On DVD-1, there are folders that include both documents and folders. The directory structure is unclear. It is very difficult to locate any given document, as the document could be in a folder or subfolder.

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- The folder on DVD-1 titled "Doc 0065-0070" contains six items, four of which are folders. The items in these folders are not in PDF format or any other easily read format. Accordingly, the unexplained documents on these files (titled in Intertrust's list with unhelpful names such as "Folder of files entitled geneview", undated, and without an author) cannot be viewed or accessed.

Accordingly, Intertrust's electronic discovery has not been provided in a way that can be readily accessed or used. Please provide a new set of documents on CD-ROM (not DVD) where each document on Intertrust's list of documents is a separate and readable PDF file, and is named in accordance with the document number on Intertrust's list of documents.

1. Order of Documents

Order 15, Rule 6(3) of the Federal Court Rules requires a discovery list to be in "convenient sequence." Would you please explain the basis of the order in which the documents are listed.

2. Authorship

A very large number of documents on your list of documents do not include any details regarding the author.

Where no author is specified for a document, is your client able to indicate whether it believes the document is authored by an employee or agent of Intertrust?

3. Missing Documents

We have not seen any of the following documents in your client's discovery:

- (a) Inventors' notes, draft papers and notebooks. (Additionally, we have seen no handwritten material at all.) These documents would fall at least within category 1 of the documents to be discovered by the Respondent.
- (b) Any documents authored by Victor Shear, apart from one published article included in a U.S. Information Disclosure Statement. These documents would fall at least within categories 1 and 12 of the documents to be discovered by the Respondent.
- (c) Any documents authored by Robert Weber apart from three published articles included in a U.S. Information Disclosure Statement. These documents would fall at least within categories 1 and 12 of the documents to be discovered by the Respondent.

- (d) Any document identified as U.S. patent application serial number 08/699,712, which is referred to at page 39 of the Patent. This document would fall at least within categories 2, 3, 7(b), 8(b) and 12 of the documents to be discovered by the Respondent.
- (e) The Ginter et al. specification, which is referred to at page 10 of the Patent. This document would fall at least within categories 2, 3, 7(b), 8(b) and 12 of the documents to be discovered by the Respondent.
- (f) The initial specifications for the DigiBox container that Intertrust submitted to the ANSI IISP Electronic Publishing Task Force, as referred to in the Abstract of the article "The DigiBox: A Self-Protecting Container for Information Commerce." This document would fall at least within categories 2, 3, 7(b), 8(b) and 12 of the documents to be discovered by the Respondent.
- (g) Drafts of, and correspondence relating to, the article titled "The DigiBox: A Self-Protecting Container for Information Commerce." This document would fall at least within categories 2, 3, 7(b), 8(b), 12 and 13 of the documents to be discovered by the Respondent. Additionally, all the publications referred to in the endnotes to this article have not been disclosed.
- (h) Talks, papers, panel presentations and courses by Intertrust's Star Lab Members. In fact, there are few documents referencing or originating from Intertrust's Star Lab research centre. These documents would fall at least within categories 2, 3, 7(b), 8(b) and (for some documents) 12 of the documents to be discovered by the Respondent.
- (i) Documents concerning the IBM Cryptolope system, and comparisons of that system to the DigiBox. These documents would fall at least within categories 2, 3, 14 and 19(b) of the documents to be discovered by the Respondent.
- (j) Source code for, and a sample of, the DigiBox container. These would fall at least within categories 2 and 3 of the documents to be discovered by the Respondent.
- (k) Any documents within categories 14 to 17, other than 2747 to 2749 and some programmer manuals.
- (l) World-wide licence or commercialisation agreements or options for world-wide licence agreements of the Respondent's patents (other than 2747 to 2749), such as the reported Mitsubishi Corporation deal of 1996 and the reported Sony licence of May 2002. These documents would fall at least within categories 15 to 17 of the documents to be discovered by the Respondent.

MALLESON'S STEPHEN JAQUES

Piper Alderman

18 July 2003

- (m) Documents (within any of the 19 categories of documents to be discovered by the Respondent) which were prepared as part of any due diligence investigation, or provided to or prepared by a third party as part of a due diligence investigation, relating to the merger or acquisition of the Respondent with or by Fidelio Acquisition Company, LLC, including documents provided to or prepared by Allen & Company LLC as part of this transaction. These documents are not privileged.

There are only three documents (other than patent applications) in your list authored by David Van Wie. There are only four documents (other than patent applications) in your list authored by Kim Worsencroft. These documents are within categories 12 and/or 13. We would expect to see more documents authored by Van Wie and Worsencroft.

There is only one document in your list of which Collison & Co. is listed as author (i.e., document 398). We would expect to see more documents from Collison & Co.

Documents of the kind referred to in paras (a) to (m) above must exist (or have existed) and would have been within the Respondent's possession custody or power at some stage. We therefore suggest that your client review its discovery to include this material as a matter of urgency.

4. Emails and Internal Memos

A small number of email messages and only one memo have been disclosed. Most of the email messages appear to be dated August and September 1996 and January and February 1997. As far as we can ascertain, no email messages prior to August 1996 have been disclosed.

There are no emails or other correspondence disclosed to or from customers or potential customers in Australia.

Would you please let us know if Intertrust made back-ups of its email and document servers and whether you have reviewed such back-ups for relevant email messages and internal memos.

5. Drafts

Many of the documents that you disclosed appear to be later drafts, where the earlier or original draft has not been discovered.

By way of example only:

- (a) A White Paper (document 1327, 2375) is said to have been revised on 20 August 1997, but the original document does not appear to have been discovered.

- (b) The TrustChip Programmers Manual, drafts 2.4a, 2.5a, 2.6b and 2.6c have been disclosed, but not prior drafts (documents 120 - 123).
- (c) A document titled "RightsChip Hiding Place Mechanism" which is stated to be revised on 8 April 2001 and 10 April 2001 (documents 110 and 111) is disclosed, but the original document has not been disclosed.
- (d) Many documents are dated in the following format "Created 12 February 2001 Revised 27 June 2001" (e.g., document 1993) but it is not apparent that the original document has been disclosed.
- (e) A few licence agreements have been disclosed (2747 to 2749), but no earlier drafts of these licences have been disclosed (and no correspondence concerning these licences has been disclosed).

Documents of the kind referred to in paras (a) to (e) above must exist (or have existed) and would have been within the Respondent's possession custody of power at some stage. We therefore suggest that your client review its discovery to include this material as a matter of urgency.

6. Website

Some limited copies of a few pages of the Intertrust website, stated by Intertrust in its list to be as at 18 June 1998, have been discovered. The full set of pages of this website have not been discovered. No electronic copies of the website have been discovered, and no versions of the website other than as at 18 June 1998 have been discovered. The Respondent operated websites in 1997 and prior to 1997 at the addresses www.erp.com and www.intertrust.com. These websites, and the documents and pages that comprise these websites, are within categories 2, 3 and 12-17.

We have evidence that 1997 and earlier versions of the websites operated by Intertrust existed. Documents that comprise these websites have not been discovered. We therefore suggest that your client review its discovery to include this material as a matter of urgency.

7. Sibert's articles

According to a version of the Intertrust website, Olin Sibert is the author listed on a number of articles, including:

- Olin Sibert. "Malicious Data and Computer Security," *Proceedings, 19th National Information Systems Security Conference*, Baltimore, Maryland, October 22-25, 1996.

- Olin Sibert, Phillip Porras, Robert Lindell. "The Intel 80x86 Processor Architecture: Pitfalls for Secure Systems," *IEEE Transactions on Software Engineering*, Volume 22 Number 5 (May 1996); received Best Paper award for original presentation at IEEE Symposium on Security and Privacy, Oakland, California, 8-10 May 1995.
- Olin Sibert. "Auditing in a Distributed System: SunOS MLS Audit Trails," *Proceedings, 11th National Computer Security Conference*, Baltimore, Maryland, 17-20 October 1988.
- Deborah D. Downs, Kenneth B. Elliott, Jeffrey J. Glass, W. Olin Sibert, Grant M. Wagner. "UNIX and B2: Are They Compatible?" *Proceedings, 10th National Computer Security Conference*, Baltimore, Maryland, 21-24 September 1987.

Mr Sibert joined the Respondent in 1994, and it appears likely that Mr Sibert wrote a number of these articles for the Respondent and about the Respondent's research or products. We do not understand why some or all of the above articles, and drafts and correspondence regarding these articles, have not been discovered.

8. Irrelevant Materials

A substantial number of documents that have been discovered appear to be irrelevant.

For example, there are a large number of technical documents that are dated after 25 February 1998 that do not appear to be within any of the categories of documents requested.

For each document on your list, would you please identify the category that you believe that it relates to.

9. Incomplete descriptions

A number of entries in the list are incomplete or meaningless descriptions of the document and do not describe any significant features of the document, such as "Various Documents" which are undated without an author (584, 585, 613, 614, 616, 804). In respect of these documents, the Applicants do not believe the Respondent has complied with the obligation to describe the document. We suggest that you review and amend the list in respect of these documents.

10. Confidentiality

A number of documents that are listed as confidential do not appear to be in any way confidential. These include extracts from the Intertrust website which we have been able to access today from public sources (500), a news release (523), print out of drop down help (760), software notice (768), user guides (851, 852, 917, 1316, 1763), fact sheets (1315) and release

Piper Alderman

18 July 2003

notes (2158). In respect of the documents which are designated "confidential", the Applicants request that the Respondent reviews its claim for confidentiality for each such document.

11. Patent Attorney Privilege

Schedule 1 Part 2 is said to comprise:

"Correspondence between the Respondent, its solicitors, attorneys, patent attorneys and counsel retained on its behalf for the dominant purpose of obtaining or providing instructions, advice, legal services or patent attorney services relating to actual or anticipated proceedings."

In addition to such material, we would expect that other documents would be brought into existence by legal advisers and patent attorneys which would not be described as "correspondence". For example, internal memoranda, draft documents and notes of telephone discussions. Such material is discoverable. We request that the Respondent reviews its position and make appropriate disclosure of that material.

12. Further discovery and confidentiality

If the Respondent does not address and correct the above deficiencies by 28 July 2003, the Applicants will draw them to the attention of the Court in an application for further discovery. This letter will be relied by the Applicants in seeking their costs of such an application.

In your fax of 15 July, you said that you would propose a confidentiality regime "shortly". We note the consent orders of 14 July by Lindgren J specify that such a regime is to be agreed by 28 July, failing which the matter may be resolved by the Court. Please provide us with your proposal as a matter of urgency so we can attempt to agree the regime *inter partes*. If agreement cannot be reached by this date, our clients will not hesitate to have the matter relisted.

Yours faithfully

IN THE FEDERAL COURT OF AUSTRALIA)
NEW SOUTH WALES DISTRICT REGISTRY)

No. N1260 of 2002

MICROSOFT CORPORATION

First Applicant

MICROSOFT PTY LIMITED

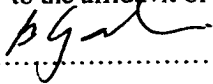
Second Applicant

**INTERTRUST TECHNOLOGIES
CORPORATION**

Respondent

EXHIBIT JVS-7

This is Exhibit JVS-7 to the affidavit of John Victor Swinson, sworn on 31 March 2004 before me:



Solicitor

MALLESON'S STEPHEN JAQUES

Confidential communication

Attention: A N Abbott

1 August 2003

Piper Alderman
Lawyers
167 Flinders Street
Adelaide SA 5000
Fax (08) 8205 3300

N Murray
Direct line
+61 2 9296 2263
Partner
K O'Connell

Dear Sirs

Microsoft Corporation & Microsoft Pty Limited v Intertrust Technologies Corporation

Thank you for your fax of 29 July regarding discovery. We respond as follows, adopting your headings. We will respond separately on more substantive issues arising from the documents your client has discovered (or not discovered, as the case may be) once we are able to inspect the documents in an appropriate manner.

Medium and form of production

In our fax of 18 July, we addressed the fact that your client has bundled many of its discovered documents into PDF files such that it is very difficult to identify and access a single document from the list of documents. The extreme example of this is the single one gigabyte PDF file on DVD-2 containing over 40,000 pages and hundreds of documents.

Such an approach hinders rather than assists the litigation process.

Intertrust could have easily scanned each document as a single PDF file, and matched these files to the list of documents (as Microsoft did). Alternatively, Intertrust could have created an index on each PDF file, allowing a user to identify and quickly jump to a particular document. Intertrust did this for some PDF files, but not the one gigabyte file on DVD-2.

As you know, we availed ourselves of your offer to provide "assistance in resolving any technical problems". We are grateful for Mr Magarey's time in speaking with Mr Swinson of our office but, with respect, Mr Magarey was unable to offer any method to directly access a particular document, other than by "guesswork", approximation and trial-and-error.

Even when it is possible to access the file on DVD-2 without crashing, Mr Magarey's suggestion that we should estimate where in the 40,000 pages the document may be, use the scroll-bar to go to approximately that point, and then simply scroll through the file to find a particular document is unhelpful. Scrolling through a file of this size is extremely time

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Page 1 of 5

MALLESON'S STEPHEN JAUQUES

Piper Alderman

1 August 2003

consuming as it takes a considerable amount of time for pages to be loaded into RAM from the DVD, in addition to the human time required in sifting through 40,000 pages.

Mr Magarey observed that there are gaps in the Bates numbers and that there is an element of guess work involved.

With respect, this is a completely inappropriate method of conducting discovery, particularly where the whole point of electronic discovery is to provide the parties with an efficient method of inspecting a large number of documents. We have considerable experience in conducting electronic discovery and we have never encountered such a situation. Your suggestion that we simply print the documents confirms that the manner in which you have provided the documents defeats the purpose of electronic discovery.

Your client's method of discovery would make it extremely difficult for us to provide a sub-set of your discovery to an independent expert, or to direct the court or an expert to a particular document in an efficient manner.

Federal Court Practice Note 17 encourages the use of information technology, including in respect of the electronic exchange of discovered documents according to an agreed protocol. We had hoped to avoid the cost and delay of preparing and negotiating such a protocol and assumed that, as the parties had indicated that exchange of documents in PDF form on CD-ROM would be appropriate, such a protocol would not be required. As you have identified, there is a limit on the size and number of files that can be loaded onto a CD-ROM. The fact that files provided by your client exceed the capacity of a CD-ROM is a clear indication that the files are too large.

Your letter of 29 July claims that "[t]he provision of the same documents again in a different medium is not necessary and will only add considerably to the costs in this matter." It is the file size and access method, rather than the medium, which is the issue. The fact that converting the manner of your client's production into an acceptable form will incur costs is not the concern of our clients. Your client's documents should have been produced in an appropriate manner in the first place and, in any event, if your client is successful in the proceeding, it may be compensated for its costs.

The Applicants will accept files on DVD if that is your client's preferred medium but the files must:

- (a) Be clearly labelled by reference to the document numbers in your client's list of documents, rather than the U.S. Bates numbers; and
- (b) either:
 - (i) contain one discovered document per PDF file; or

MALLESON'S STEPHEN JAUQUES

Piper Alderman

1 August 2003

- (ii) have bookmarks linked to the first page of each discovered document within the file, but no single PDF file should contain more than 5 discovered documents, and each document in the file must follow sequentially in the Respondent's list of documents.

If your client does not agree by 10 am on 5 August to provide its discovered documents in the form described in the paragraph above by 15 August, the Applicants will immediately apply for appropriate orders.

Order of documents

We do not understand your response. The second sentence appears to contradict the first sentence.

We also do not understand the "convenient sequence" that the documents are listed in the Respondent's list of documents. From your comments, it appears that the sequence of the list is the Bates number sequence, but the Bates numbering on the documents is just a numbering system created by the Respondent for a U.S. litigation, where the rules do not have a requirement similar to Order 15, Rule 6(3). A numbering system created by the Respondent that has no meaning to anyone other than the Respondent is not a "convenient sequence".

Your response begs the question as to the "convenient sequence" of the order of the documents on the Respondent's list of documents. What is the basis of the order of the Bates numbering?

We do not understand your comment that "the files have not been listed in Bates order because they could not be sent to Australia in Bates order". The documents on the list of documents can be listed in any order, and how the documents are sent to you from the U.S. is not relevant.

Authorship

Please indicate the date by which you will complete the "Author" field in the list of documents.

Missing Documents

- (a) You state that your client has discovered such documents. Would you please identify the document numbers on the Respondent's list of documents where such documents are located.
- (d)-(e) When will your client make such discovery?
- (f)-(g) You state that your client has discovered such documents. We are unable to locate them in its discovery. Clearly, such documents exist. Would you please identify the document numbers on the Respondent's list of documents where such documents are located.

MALLESON'S STEPHEN JAUQUES

Piper Alderman

1 August 2003

- (h) Do we assume from your answer that Intertrust's Star Labs was not involved in research relating to techniques for defining, using and manipulating rights management data structures?
- (i) You state that your client has discovered such documents. Would you please identify the document numbers on the Respondent's list of documents where such documents are located.
- (k)-(m) You state that your client has discovered such documents. Would you please identify the document numbers on the Respondent's list of documents where such documents are located.

You indicate in respect of several issues (both in relation to this heading in our letter and elsewhere) that your client is considering its position and may make supplementary discovery. Please indicate the date by which any supplementary discovery will be given.

Emails

Your fax did not explain why only a small number of email messages were disclosed.

As part of Intertrust's regular business operations, and prior to any proceedings involving Microsoft, did Intertrust make electronic backups of its computer system?

Drafts

You state that your client has discovered such documents. Would you please identify (by document numbers) where in the Respondent's list of documents the documents listed in this section of our 18 July letter are located.

Website

We disagree with your client's assertions. We have located documents in this category through our own searches and assume that more exist.

Irrelevant Materials

Prior to including a document on the Respondent's list of documents, your client needed to determine whether the document was within a requested category. In our view, as previously stated, a number of the documents are not within any category. It appears that the Respondent was not careful in its discovery obligations, or else had the intention of "snowing" the Applicants with irrelevant documents.

For each document on the Respondent's list of documents dated after 25 February 2003, please identify the exact category or categories to which that document relates. To say that a document "may" be within one of eight categories is unhelpful.

MALLESON'S STEPHEN JAQUES

Piper Alderman

1 August 2003

Incomplete descriptions

Please indicate when your client will update the "Document" column in the documents in compliance with Order 15.

Timetable

Your client's failure to provide its discovered documents in an appropriate manner and delay in providing supplementary discovery may jeopardise the preparation of our clients' evidence by the due date of 20 October 2003. Our clients reserve the right to rely on the Respondent's default in any application for an extension of time and for costs.

Yours faithfully

A handwritten signature in black ink, appearing to be 'S. Jaques', written over a horizontal line.

IN THE FEDERAL COURT OF AUSTRALIA)
NEW SOUTH WALES DISTRICT REGISTRY)

No. N1260 of 2002

MICROSOFT CORPORATION

First Applicant

MICROSOFT PTY LIMITED

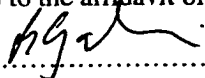
Second Applicant

**INTERTRUST TECHNOLOGIES
CORPORATION**

Respondent

EXHIBIT JVS-8

This is Exhibit JVS-8 to the affidavit of John Victor Swinson, sworn on 31 March 2004 before me:


.....

Solicitor

MALLESONS STEPHEN JAQUES

Confidential communication

Attention Anthony Muratore

Freehills
MLC Centre
Martin Place
Sydney NSW 2000
Fax (02) 9322 4000

9 October 2003

N Murray
Direct line
+61 2 9296 2263
Partner
K O'Connell

Dear Sirs

Microsoft Corporation & Anor v Intertrust Technologies Corporation

On 27 August 2003, we referred you to our letter of 18 July 2003 to Piper Alderman setting out a number of substantive issues in relation to your client's discovery, including the deficiencies in your client's list of documents. We pointed out that Piper Alderman indicated it would be reviewing your client's discovery. We raised this issue with you again by fax on 11 September and 26 September but we have not yet received your client's response.

An additional issue in relation to discovery is that the parties have not yet agreed the confidentiality regime to apply to confidential documents discovered in the proceedings, and accordingly, we have been unable to provide any discovered confidential documents you have provided so far to the experts for their consideration.

Timetable

Our clients' evidence is due on 20 October but in the light of the issues regarding the confidentiality regime, additional time will be required to complete that evidence. The proceedings are currently listed for directions on 3 November 2003. Our clients propose that the current timetable should be varied by consent and the directions hearing should be vacated. We enclose short minutes of proposed consent order for your client to consider.

The proposed timetable is predicated on your client responding to us on the substantive discovery issues by no later than Thursday, 16 October, and providing supplementary discovery by no later than 31 October. Please confirm that your client is able to do this. If your client is unwilling to provide this confirmation, we will seek to have the matter relisted for orders in relation to the adequacy of your client's discovery.

Confidentiality Regime

Regarding confidentiality, our clients will consent to a confidentiality order without the proposed paragraph 14, subject to the condition that if our client is required to give discovery of

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Page 1 of 3

MALLESON'S STEPHEN JAQUES

Freehills

9 October 2003

confidential material, the matter be relisted and have the paragraph 14 issue decided by the court.

We look forward to hearing from you.

Yours faithfully

A handwritten signature in black ink, consisting of a stylized 'S' followed by a long horizontal line.

IN THE FEDERAL COURT OF AUSTRALIA)
NEW SOUTH WALES DISTRICT REGISTRY)

No. N1260 of 2002

MICROSOFT CORPORATION

First Applicant

MICROSOFT PTY LIMITED

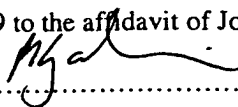
Second Applicant

**INTERTRUST TECHNOLOGIES
CORPORATION**

Respondent

EXHIBIT JVS-9

This is Exhibit JVS-9 to the affidavit of John Victor Swinson, sworn on 31 March 2004 before me:



Solicitor

Attention Anthony Muratore

18 November 2003

Freehills
MLC Centre
Martin Place
Sydney NSW 2000

K O'Connell
Partner
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+61 2 9296 2188

Fax (02) 9322 4000

Dear Sirs

Microsoft Corporation & Anor v Intertrust Technologies Corporation

Confidentiality Orders

We have not received a response from you to our fax of 11 November 2003 regarding the proposed Confidentiality Orders. This is delaying the preparation of our expert reports.

Intertrust's Discovery

In our fax to you of 21 October 2003, we raised a number of issues concerning Intertrust's lack of full discovery. We have yet to receive a response to all the issues raised in our fax.

For example, Intertrust has not provided any disclosure concerning U.S. Patent No. 5,845,281, the interference proceeding that has been reported as being invoked by Macrovision, nor the initial analysis conducted by Intertrust of the Macrovision patent. Such documents would fall within at least category 2 and possibly category 7, 9 and/or 10 and/or other categories. U.S. Patent No. 5,845,281, and the corresponding foreign patents and applications, are clearly relevant to the issues in dispute in these proceedings.

You informed us on 22 October that Intertrust will provide additional discovery of the due diligence documents and the Olin Sibert publications "in approximately three weeks". We are still waiting for that additional discovery.

Intertrust's incomplete list of documents was provided to us in June, and we are still waiting for it to be revised and completed.

Intertrust's Claim Interpretation

In our fax to you of 21 October, we asked:

"In respect of the meaning of the claims of the Patent, we are not clear whether Intertrust is taking a different view in this case to that asserted by Intertrust in the

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MALLESON'S STEPHEN JAGUES

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18 November 2003

proceedings involving the First Applicant and Intertrust in the U.S. District Court. In response to the Applicants' Third Notice to Admit, Intertrust denied facts that, in our view, corresponded to Intertrust's claim interpretation which was adopted by the U.S. District Court in relation to U.S. Patent No. 5,920,861. Your fax of 16 October confuses Intertrust's position. Would you please let us know whether Intertrust's position is that it accepts that the meaning of the claims of the Patent is the same as its position in relation to U.S. Patent No. 5,920,861 as advanced in the case currently before the U.S. District Court and adopted by the U.S. District Court in the Markman hearing."

Does Intertrust contend that any term used in a claim of Australian Patent No. 728,776 has a different meaning to the meaning advanced by Intertrust in the U.S. case for the same term?

We are awaiting your response.

Yours faithfully

Mallesons Stephen Jagues

IN THE FEDERAL COURT OF AUSTRALIA)
NEW SOUTH WALES DISTRICT REGISTRY)

No. N1260 of 2002

MICROSOFT CORPORATION

First Applicant

MICROSOFT PTY LIMITED

Second Applicant

**INTERTRUST TECHNOLOGIES
CORPORATION**

Respondent

EXHIBIT JVS-10

This is Exhibit JVS-10 to the affidavit of John Victor Swinson, sworn on 31 March 2004 before me:


.....
Solicitor

MALLESON'S STEPHEN JAQUES

Attention Anthony Muratore

28 November 2003

Freehills
MLC Centre
Martin Place
Sydney NSW 2000

J Swinson
Partner
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Fax (02) 9322 4000

Dear Sirs

Microsoft Corporation & Anor v Intertrust Technologies Corporation

Intertrust's Discovery

Your client's discovery was due in June. Your client should have been reviewing its files for relevant documents well before now. In any event, the US case and the Australian case are different in scope and have different timetables. You cannot delay discovery in Australia and not comply with Australian court orders, as your client has done, because there is a different timetable in the US case. Your client appears to be purposely delaying in providing discovery in Australia to delay this case.

Your client currently has an incomplete list of documents and correspondingly incorrect verifying affidavit on record. This should be addressed as a matter of urgency.

We will rely on these matters in any directions hearing arising under Order 7 of Justice Lindgren's orders of 3 November 2003.

Yours faithfully

Mallesons Stephen Jaques

IN THE FEDERAL COURT OF AUSTRALIA)
NEW SOUTH WALES DISTRICT REGISTRY)

No. N1260 of 2002

MICROSOFT CORPORATION

First Applicant

MICROSOFT PTY LIMITED

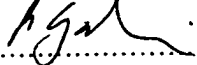
Second Applicant

**INTERTRUST TECHNOLOGIES
CORPORATION**

Respondent

EXHIBIT JVS-11

This is Exhibit JVS-11 to the affidavit of John Victor Swinson, sworn on 31 March 2004 before me:


.....

Solicitor

MALLESONS STEPHEN JAQUES

Confidential communication

Attention Anthony Muratore
Ben Laske

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Level 32
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Sydney NSW 2000
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15 January 2004

K O'Connell
Partner
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Dear Sirs

Microsoft Corporation & Anors v Intertrust Technologies Corporation

We refer to the discovery your clients have provided to us in relation to this matter.

In our letters of 18 July 2003, 21 October 2003 and 18 November 2003, we expressed concern that there were a number of documents we would expect to be in your client's possession, custody or power, but which have not been discovered.

In response, we have received from your client two rounds of supplementary discovery which were said to remedy some of these deficiencies.

Notwithstanding this supplementary discovery, we note that the following issues remain regarding your client's discovery:

- (a) The following documents are referred to in documents that have been discovered to us, appear to be discoverable but do not appear to have been discovered:
 - (i) A document titled "On second thought..." is referred to in document IT0447 (Bates number IT00026241).
 - (ii) A document titled "You may be right" is referred to in document IT0448 (Bates number IT00026242).
 - (iii) A document titled "Answers to your questions" is referred to in document IT0449 (Bates number IT00026243).

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MALLESON'S STEPHEN JAKUES

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15 January 2004

- (iv) A document titled "198rvw" is referred to in document IT0466 (Bates number IT00026320).
- (v) A document titled "TD00213B: CM5: A Radically Simplified DigiBox Container" is referred to in document IT2226 (Bates numbers IT05729302-IT05729313).

Each of these documents would fall within at least category 1, and possibly category 12, of the documents to be discovered by the Respondent. Please provide us with a copy of these documents.

- (b) Document IT0442 (Bates number IT00018072) discloses an email from Ed Hall in which Mr Hall lists "[s]upport Luke and John's Grand Experiment with templates" in his September "To Do List". We would expect that, in the course of this "Grand Experiment", Ed Hall, "Luke" and "John" would have exchanged emails, internal memos, meeting minutes or development notes. Documents relating to that discussion would fall at least within category 1, and possibly 12, of the documents to be discovered by the Respondent. We have not seen these documents in your client's discovery. Please have your client review its discovery to include any such documents.
- (c) Document IT0450 (Bates number IT00026244) refers to a "Collabra topic" established by "Luke" relating to "responses on TD00198". TD00198 is about DigiBox templates. A Collabra topic relating to TD00198 would fall at least within category 1 and 3, and possibly category 12, of the documents to be discovered by the Respondent. Please provide us with a copy of all submissions, responses or documents relating to this Collabra topic.
- (d) In an email disclosed in document IT0452 (Bates number IT00026246), Kim Worsencroft suggests getting the "apps group together" to discuss Luke Tomasello's "TD00198: DigiBox Templates General Overview and Proposal". We have not seen any documents relating to this discussion. These documents would fall at least within category 1 of the documents to be discovered by the Respondent. Please provide us with all documents relating to this meeting, or any other meeting in which the "TD00198: DigiBox Templates General Overview and Proposal" was discussed.
- (e) Document IT0468 (Bates number IT00026326) refers to a meeting on "templates and data description and data visualization". No other documents relating to this meeting, or issues raised in this meeting, were found in your client's discovery. It seems unlikely that these issues, which appear to have remained unresolved in that meeting, would not have been the subject of further

MALLESON'S STEPHEN JAQUES

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15 January 2004

discussion. Documents relating to that discussion would fall at least within category 1, and possibly 12, of the documents to be discovered by the Respondent. We suggest that your client review its discovery to include any documents relating to or expanding upon this meeting, or the issues discussed in this meeting.

- (f) The header (containing, for example, the "From", "Sent", "To", "Cc" and "Subject" fields) of many of the emails disclosed in your client's discovery appear to have been removed or omitted. The headers form part of the discoverable document. Please have your client review its discovery to include the headers on discovered emails. Specifically, and without limiting the scope of the request in the previous sentence, please provide us a copy of the emails, including their headers, disclosed in documents IT0442, IT0447, IT0448, IT0449, IT0450, IT0452 and IT0466.

We look forward to receiving further supplementary discovery from your client to correct these deficiencies.

Yours faithfully

Mallerson Stephen Jaques